APPEAL NO. 010730

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 12, 2001. With respect to the issues before her, the hearing officer found that the appellant (claimant) reached maximum medical improvement (MMI) on July 10, 1996, with an 11% impairment rating (IR), and that the respondent (self-insured) is entitled to contribution at the rate of 64%. On appeal, the claimant contests the hearing officer's determination of the MMI date and the IR. The self-insured responded, urging affirmance. The contribution findings were not appealed and have become final.

DECISION

Affirmed.

At issue in this case is whether the designated doctor's initial or amended certification of MMI/IR should be given presumptive weight. The claimant initially injured his back on _____. He sustained another injury to his back on _____, and it is this injury from which the dispute regarding MMI/IR has arisen. Dr. H was the designated doctor who was appointed by the Texas Workers' Compensation Commission (Commission) to rate the 1996 injury. He determined that the claimant reached MMI on July 10, 1996, with an 11% IR. There is no evidence in the record to suggest that spinal surgery was contemplated near the time that Dr. H made his certification.

The claimant continued to receive conservative medical treatment for his back until February 1999, at which time he was referred to Dr. M, who ultimately recommended spinal surgery. The surgery was performed in July 1999. Subsequent to his surgery, the claimant was again examined by Dr. H on July 28, 2000, at which time Dr. H amended his certification to reflect that the claimant reached MMI on July 10, 1998, with an 18% IR.

Section 408.122(c) and Section 408.125(e) provide, in part, that the report of the designated doctor has presumptive weight, and the Commission shall base its determination of MMI and IR on the report unless the great weight of the other medical evidence is to the contrary. The determination as to whether a designated doctor's certification based on an intervening surgery should be afforded presumptive weight is to be made based on (1) an analysis of whether the surgery which was eventually performed was "under active consideration" at the time of the initial designated doctor's evaluation and if the surgery was not under active consideration, it is inappropriate to amend the certification based upon it (Texas Workers' Compensation Commission Appeal No. 962654, decided February 6, 1997; Texas Workers' Compensation Commission Appeal No. 962107, decided December 2, 1996); and (2) whether the employee had the surgery in a reasonable amount of time after the initial designated doctor's report. These criteria have not been met here. The evidence reflects that the surgery was not under active consideration until over two years after the initial certification was made. The intervening

four years between reports was properly considered by the hearing officer as too great an interval to reopen the evaluation of IR in this case. The fact that an injured worker is entitled to lifetime medical treatment does not leave the IR subject to reopening.

We are satisfied that the hearing officer did not err in determining that Dr. H's initial certification should be afforded presumptive weight. We will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them to be so in this case. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge